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Supreme Court of the United States

OCTOBER TERM, 1957

No. 697

SOUTH CAROLINA GENERATING COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, ET AL.,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Dated February 24, 1958

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I.

INTRODUCTION

The Brief for the Respondent dismisses summarily the principal questions presented to the Court in this case and focusses on the subsidiary question of evidence, a question that of itself would not merit review by this Court. This dismissal includes arguments that seem to us to oversimplify the important questions. For this reason, we present this brief reply.

II.

THE APPLICATION OF SIERRA

The principal question here is what is meant by the simple term "reasonable" in the Federal Power Act in the context of rates established by a valid contract. This Court said, in effect, in the *Sierra*[1] opinion, that, when rates established by arm's-length bargaining between unaffiliated utilities are at issue, the Commission must apply a standard of reasonableness different from that to be applied in the review of rates not fixed by contract. It is not enough, this Court held, that the Commission conclude simply that the contract rates do not coincide with the rates that would result from application of the formula of its predilection; the Commission, in order to annul the contract, must find that substantial economic harm would result to one party or the other from application of the contract. That is because valid contracts can be set aside only when they adversely affect the public interest in a demonstrable manner as exemplified in *Sierra*. That is exactly what the Commission did not and could not find here.

Reasonableness is not an exact standard. It has varying

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[1] *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U. S. 348 (1956).

implications in varying circumstances. One who is authorized to pick the most reasonable choice from a number of alternatives faces a problem quite different from one who is required to determine whether a choice previously selected is reasonable. The Commission has shown here that it does not differentiate between these two problems. Its solution here was to narrow the question by concluding that only a single path could lead to a "reasonable" conclusion. That contravenes its duty. The Commission conceives that the standard of reason is only an expression of its individual opinion; it does not apply it in the tradition of judicial restraint formulated by the courts.

The Commission states that the standard that we urge with the support of the *Sierra* decision can lead only to absolute immunity for contract rates (Brief, pp. 7-8). Its fear is unjustified. It overlooks its power to annul contracts that are unreasonable when the test is the broad band of reasonableness established by this Court. We do not, of course, dispute this power. And utilities are not likely to abuse this broad standard. The basic principles of economic self-interest will preclude it. Two utilities not required by law to provide or accept service between each other will do so only when there are mutual economic advantages. Such mutual advantages undeniably existed here in the form of annual savings to Georgia Power of $600,000 and material help to Petitioner and E. & G. If the burden resulting from the contract on either party becomes unduly heavy, the Commission is authorized to revise the contract rates. But that is the only time for revision and that time has not come in this case.

Furthermore, the Commission attempts to gain support for the decision below from *Sierra* by the bold assertion that both simply provide for lower rates for consumers (Brief, p. 10). But again, we suggest, the question arises as to

designation of the consumers protected, for South Carolina consumers, ably represented here (No. 782), are required by the Commission in effect to pay the award that it has given to Georgia consumers. Nothing is gained in this case by arranging the parties on the side of the angels; there are angels everywhere.

Finally, *Memphis*[2] cannot be dismissed so easily as the Commission would like (Brief, p. 11, footnote 2). That case relates to the *procedure* to be applied in respect of changes in contract rates; this case relates to the *standard* to be applied in determining the legality of changes in contract rates. Both raise important questions of administrative law. *Memphis* holds that a different procedure is required when contract rates are reviewed from that to be followed when filed rates are examined. *Sierra* holds that a different standard for review applies to contract rates from that applicable to filed rates. The Commission does not like the *Sierra* rule, for the rule fetters its dominion: it has evaded it here. Unless both the *Memphis* case and this case are reviewed by this Court, the status of contract rates will remain uncertain. Since this Court has agreed to consider that phase of the problem presented by *Memphis*, it would be most appropriate to clear up here the other phase left uncertain now that the *Sierra* rule has been undermined by the decision below.

III.

THE EFFECT OF MONTANA-DAKOTA

The Commission says: when a commission fixes rates, a reviewing court can upset them only when it finds them

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[2] *Memphis Light, Gas and Water Division* v. *Federal Power Commission* (D. C. Cir. November 21, 1957), certiorari granted, October Term, 1957, Nos. 691, 694, 695, February 3, 1958.

outside the zone of reasonableness; but when utilities fix rates by contract, a reviewing commission may upset them when they are *within* the zone of reasonableness. At least that is the only conclusion that we can draw from the argument of the Commission (Brief, p. 10).

So stated, the argument is patently absurd. We assume that the Commission would not now argue that its duty here is to fix the contract rates; it does not fix rates.[3] It performs a more expanded function than a reviewing court, for it hears evidence and finds facts. But we suggest that the legal standard of reasonableness to be applied is the same, whether applied by court or commission. The Commission cannot simply close its eyes to the *Montana-Dakota*[4] "band of reasonableness" rule as it would like to do. The rule applies here, especially as to contract rates, and the Commission simply did not follow it.[5]

If *Montana Dakota* is to retain any substance at all, this case should be reviewed and the action of the Commission reversed.

IV.

SUBSTANTIAL EVIDENCE

Strangely enough, the Commission devotes the greater part of its argument to the rather subsidiary questions arising under the substantial evidence rule (Brief, pp. 12-18). A detailed answer is not appropriate here, though we note

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[3] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332 (1956).

[4] *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246 (1951).

[5] It will not do to say at this late date that application of the rule would not have led to a different result (Brief, pp. 11-12). The computations made by the Commission are merely exercises in arithmetic and do not, in our opinion, accurately reflect findings that would have had to be made by the Commission had it sought first to determine whether the contract rates were within the zone of reasonableness.

that not a single record reference to evidence is given.

The Commission does not find any substantial evidence to support its findings. There was, for example, evidence of record that the cost of equity funds was 10% (II. 155-7). The Petitioner sought interest during construction on equity funds only at the reduced rate of 8% (II. 185). The Commission allowed the "generous" rate of 6% (Brief, p. 17). But what evidence is there that 6% is "generous"? There is not a word of record, and the Commission does not even assert that there is. This is merely an example of how far the Commission strayed into the field of expertise.

The Commission should be required to base its decisions on evidence and not on its preconceived notions of propriety.

V.
CONCLUSION

The Brief for the Respondent merely emphasizes the importance of review in this case. The writ applied for should be awarded.

Respectfully submitted,

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